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Supreme Court, U.S.
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No. 89-1696

In The
Supreme Court of the United States
October Term, 1990

PEABODY COAL COMPANY AND
OLD REPUBLIC INSURANCE COMPANY,

Petitioners,

v.

HUBERT C. TAYLOR AND DIRECTOR, OFFICE
OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

RESPONDENT TAYLOR'S STATEMENT IN OPPOSITION TO THE COAL COMPANIES' MOTION TO CONSOLIDATE NOS. 89-1696, 89-1714, 90-113, AND 90-114

Two separate circuit conflicts respecting the validity or scope of the rebuttal provisions of the Department of Labor ("DOL") interim regulation at 20 C.F R. § 727.203(b) exist. Taylor's Op. Cert. Br. at 8, 13-14. One involves the proper scope of the rebuttal provision at § 727.203(b)(2) (the "§ (b)(2) issue"). Id. The second involves the validity of the rebuttal provisions at §§ 727.203(b)(3) and (b)(4) (the "§§ (b)(3)/(b)(4) issue"). Id. This case is the only case pending before the Court that presents the § (b)(2) issue. Five cases pending before the Court, including this one, are part of the circuit conflict respecting the §§ (b)(3)/(b)(4) issue. [1]

[1] In addition to this case, these cases are Bethenergy Mines, Inc. v. Director, O.W.C.P., 890 F. 2d 1295 (3rd Cir. 1989), petition for cert. filed 58 U.S.L.W. 3725 (U.S. May 7, 1990) (No. 89-1714); Dayton v. Consolidation Coal Co., 895 F. 2d

Four coal companies (the "coal companies") have now jointly filed a motion with this Court to consolidate all four of the cases in which they are parties (Nos. 89-1696, 89-1714, 90-113, and 90-114). Their motion should be denied insofar as it pertains to this case.

1. If this Court decides to resolve the existing circuit conflicts respecting the DOL rebuttal provisions, the coal companies request the Court to do so by affording plenary review in all four cases, including this one, in which they are parties. We submit that the Court should deny the coal companies' request, at least insofar as they include this case among those they want consolidated. Motion at 1. In our brief in opposition to certiorari, we explained (at 8-13) why plenary review of the Seventh Circuit's decision here is inappropriate. We showed that Peabody could not establish rebuttal under any of the DOL rebuttal provisions even if all of them were applied to Taylor's case, so that the judgment of the court of appeals is correct without regard to either of the questions that petitioner Peabody Coal raised in its petition. Neither Peabody nor the Director has even attempted to counter our showing to that effect, [2] on which

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173 (4th Cir. 1990), petition for cert. filed, 59 U.S.L.W. 3055 (U.S. July 17, 1990) (No. 90-114); Robinette v. Director, O.W.C.P., 902 F. 2d 1566 (4th Cir. 1990), petition for cert filed, 59 U.S.L.W. 3073 (U.S. July 25, 1990) (No. 90-172); Taylor v. Clinchfield Coal Co., 895 F. 2d 178 (4th Cir. 1990), petition for cert. filed, 59 U.S.L.W. 3055 (U.S. July 17, 1990) (No. 90-113).

[2] Peabody has not filed any reply to our brief in opposition. Nor do the coal companies, as a group, challenge our showing to that effect in the motion to consolidate. To be sure,

we stand as our principal response to the consolidation motion.

2. In our brief in opposition, we also argued (at 13-26) that if this Court did not deny Peabody's petition here in its entirety, and granted plenary review of the §§ (b)(3)/(b)(4) issue in one of the other pending cases properly presenting that issue, then (and only then) it should grant review here of the § (b)(2) issue. Our opposition to the motion to consolidate is consistent with that argument. Specifically, we agree with the Director and petitioner Pauley in No. 89-1714 that it is not necessary to grant plenary review in more than one case to resolve the circuit conflict respecting the §§ (b)(3)/(b)(4) issue. Dir. Resp. Br. in Dayton (No. 90-114) at 7 and n. 3; Reply Br. for Petitioner in Bethenergy Mines (No. 89-1714) at 5-9.

3. We also agree with petitioner Pauley that to grant review in several of the cases addressing the DOL rebuttal provisions would promise manageability problems for the Court and the parties. Reply Br. for Petitioner in Bethenergy Mines (No. 89-1714) at 4. At the same time, we submit that if this Court granted plenary review in just one case to resolve the §§

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the coal companies' joint motion contends in passing that Taylor did not properly raise in the proceedings below the argument that the ALJ erred in concluding that Peabody had rebutted the DOL interim presumption under the rebuttal provision at § 727.203(b)(2). Motion at 3 and n. 1. But the coal companies' contention to this effect is wrong. Indeed, Taylor's primary argument below was that the ALJ's § 727.203(b)(2) finding was erroneous because, in violation of Section 402(f)(2) of the Black Lung Benefits Act, the ALJ construed § 727.203(b)(2) of the DOL interim regulation to entail a test that was more restrictive to black lung claimants than the proper test under § 410.490(c)(2), the companion provision to § 727.203(b)(2).

(b)(3)/(b)(4) issue,[3] and then granted review in this case to resolve the § (b)(2) issue, neither the Court nor the parties would be unduly burdened. Moreover, if the Court did grant plenary review in Bethenergy Mines to resolve the §§ (b)(3)/(b)(4) issue, see note 3 supra, and in this case to resolve the § (b)(2) issue, then it would be appropriate to consolidate the two cases. However, if the Court orders such a consolidation, it should permit the claimants in the two cases to file separate briefs, thereby allowing full exploration of the §§ (b)(3)/(b)(4) issue on the one hand and the § (b)(2) issue on the other.

Respectfully submitted,

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[3] We agree with petitioner Pauley that Bethenergy Mines (No. 89-1714) is the most appropriate case for resolution of the §§ (b)(3)/(b)(4) issue and the constitutional issue related to it.

CERTIFICATE OF SERVICE

Jack N. VanStone hereby certifies that he is a member of the Bar of the Supreme Court of the United States, is counsel of record for Hubert C. Taylor, and that on September 25, 1990, he served a copy of the attached Statement upon:

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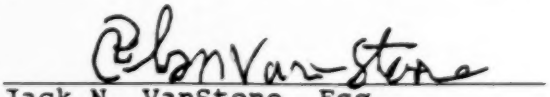

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